

In the Matter of Regan Lore, South Woods State Prison
Department of Corrections
DOP DKT. NO. 2005-1878
OAL DKT. NO. CSV 544-05
(Merit System Board, decided May 24, 2006)

The appeal of Regan Lore, Senior Correction Officer, South Woods State Prison, Department of Corrections, removal effective October 27, 2004, on charges, was heard by Administrative Law Judge Bruce M. Gorman, who rendered his initial decision on February 28, 2006 reversing the removal. Exceptions were filed on behalf of the appointing authority. Cross exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board, at its meeting on May 24, 2006, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Merit System Board finds that the action of the appointing authority in removing the appellant was not justified. The Board therefore reverses that action and grants the appeal of Regan Lore. The Board further orders that appellant be granted back pay, benefits, and seniority from his date of separation from employment to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Board further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Board, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 544-05

AGENCY DKT. NO. 2005-1878

REGAN LORE,

Appellant,

v.

SOUTH WOODS STATE PRISON,

Respondent.

Robert Wolf, for appellant

Kathleen Asher, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: February 10, 2006

Decided: February 28, 2006

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appealed respondent's action terminating his employment as a Corrections Officer at South Woods State Prison (South Woods) for testing positive for marijuana during a random urine test. The appellant requested a fair hearing and the matter was transmitted to the Office of Administrative Law (OAL) on February 4, 2005, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled for a hearing on July 14, 2005, but was adjourned at the request of appellant's attorney due to a

scheduling conflict and witness unavailability. The matter was rescheduled for hearing on February 10, 2006, in the OAL office in Atlantic City, New Jersey. The hearing proceeded on that date and the record closed.

FACTUAL DISCUSSION

Appellant tested positive for marijuana during a random urine test. Dennis Gunn, Senior Investigator, testified for respondent. He has served in his present position for four years. Part of his job entails monitoring drug tests. During his time as an investigator, he has monitored between 300 and 400 such tests.

Gunn testified that on August 18, 2004, he monitored a drug test at South Woods. The test was random. Gunn was provided with a computer generated master list of social security numbers. The officers matching the social security numbers were tested.

Appellant was one of those officers. He arrived at the appointed time, filled out the requisite paperwork, then went into the bathroom and voided into two specimen bottles. Appellant then placed the samples in a secured freezer. Gunn testified only he and other Special Investigations Division (SID) officers had access to the freezer.

Gunn testified that the first specimen was transported to the State Toxicology Lab for analysis on August 31, 2004. On cross examination Gunn admitted that the sample should have been transported within one day, but noted that the department policy provides for storage in a controlled access refrigerated storage area (R-4:26).

Gunn identified the Continuity of Evidence form (R-5) reflecting proper transport of specimen #1 to the State Toxicology Lab. Appellant's counsel did not contest the chain of custody.

Gunn testified that after the results of the test of specimen #1 came back positive, appellant requested that specimen #2 be tested by an independent laboratory. Gunn stated such additional testing was the reason the second specimen was taken. Gunn testified that specimen #2 was picked up by Lab Corp on September 30, 2004. From there it apparently disappeared.

Gunn testified that specimen #1 was found to be positive for marijuana. In response, appellant submitted a statement (R-8) in which he denied using marijuana and had no knowledge of being in a place where marijuana was smoked.

Salvatore Leto testified for respondent. Leto is a Senior Investigator with respondent. He testified about respondent's procedure for conducting testing. None of his testimony was significant, as appellant did not contest the procedure used by respondent.

George F. Jackson then testified for respondent. Dr. Jackson is the Director and Chief Toxicologist for the New Jersey State Toxicology Lab. He has held that position since November 2003. His job places him in overall charge of the lab. He has overseen more approximately 20,000 cases since his appointment.

Dr. Jackson was stipulated as an expert in toxicology.

Dr. Jackson stated that in accordance with normal procedure, the specimen was tested twice. It was initially screened. When the initial screening came back, appellant's specimen was flagged for cannabinoids. The lab then

subjected the specimen to intensive testing through the use of gas chromatography and mass spectrometry. This testing resulted in a positive reading of 11.7 nanograms per milliliter (11.7 ng/ml) for cannabinoids (R-9:46).

Dr. Jackson then explained the meaning of the reading. He stated that any reading of 10 ng/ml or lower is discarded as unreliable. The error factor at that level is too great. Only readings above 10 ng/ml are deemed actionable. Appellant's reading is 1.7 ng/ml above that minimum.

Dr. Jackson then testified that readings between 10 ng/ml and 15 ng/ml are presumptively considered to be the result of passive inhalation. Dr. Jackson specifically utilized the word "presumptively." Over 15 ng/ml, passive inhalation may be ruled out. He stated that appellant's reading of 11.7 ng/ml was consistent with passive inhalation.

Dr. Jackson stated the highest reading he ever saw was more than 200 ng/ml. He also agreed that cigarette and cigar smoke can mask the odor of marijuana. He confirmed that it was possible to passively inhale marijuana at an outdoor concert.

At the conclusion of Dr. Jackson's testimony, I interrogated him, seeking clarification. Dr. Jackson advised that to him the word presumption meant "high probability." Therefore, when he stated that appellant's reading of 11.7 ng/ml was presumptively considered to be the result of passive inhalation, that meant there was a "high probability" that the reading resulted from passive inhalation.

I asked Dr. Jackson if he had an opinion as to what the more likely cause of the reading was, active inhalation or passive inhalation. He stated that he could not rule out either possibility. They were equally likely.

Harry Chance testified for respondent. He is an administrative captain at South Woods. Captain Chance is in charge of, inter alia, staff discipline.

Captain Chance introduced the Department's Drug Testing Policy (R-10). He noted that the policy calls for anyone who tests positive for illegal drug use to be "processed for termination from service" (R-10:17).

However, Captain Chance agreed that officers are not terminated because they test positive for illegal drugs; they are terminated for using illegal drugs. The test is considered prima facie evidence of illegal drug use, and a positive test results in the processing of termination. But the actual termination offense is illegal drug use.

Following respondent's case, appellant rested without calling any witnesses.

During summation, respondent's counsel conceded that it was illegal drug use, and not the positive test result, that warranted termination.

LEGAL ANALYSIS

Captain Chance was correct in his testimony. Illegal drug use is immediate grounds for termination. Given the sensitive nature of the corrections officer's job, and given the substantial number of drug offenders a corrections officer must guard, it is paramount that no officer use illegal drugs. The Department's policy on this issue is well founded.

But as both Captain Chance and respondent's counsel conceded, a positive drug test does not result in termination if it can be shown that such a test does not prove illegal drug use. And that is the case here.

Dr. Jackson is a well respected scientist. More significantly, he acted in this case as *respondent's* expert witness. Yet Dr. Jackson concluded that appellant's reading created a presumption, that is, a "high probability" that it was caused by passive inhalation. He stated that, at best, it was equally as likely that the reading was caused by passive inhalation as by active inhalation.

Respondent bears the burden of proof in this case. The quantum of that burden is proof by a preponderance of the evidence.

Based upon Dr. Jackson's testimony, respondent has failed to carry forward that burden. Respondent's best case scenario is that it is equally likely that active inhalation caused the test result as passive inhalation. In other words, at best it is a 50%-50% proposition.

The burden of proof imposed upon respondent requires proof by a preponderance of the evidence – at least 51%. By virtue of its own expert's testimony, respondent has failed to meet that burden.

Respondent may argue that the passive inhalation indicates appellant was in a place he should not have been. But respondent has placed no facts upon the record that would allow me to reach such a conclusion. Respondent is left with mere supposition, and supposition is not enough.

Accordingly, based upon Dr. Jackson's testimony, I **FIND** and **CONCLUDE** that respondent has failed to meet the burden of proof imposed upon it. Accordingly, respondent's action terminating appellant from his employment must be **REVERSED**. Appellant must be restored to his position with full back pay and reasonable counsel fees.

ORDER

I **ORDER** that respondent's action terminating appellant's employment be **REVERSED**.

I **ORDER** that appellant be restored to his position with full back pay and reasonable counsel fees subject to any mitigation for earnings from other employment, unemployment or similar items.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, DEPARTMENT OF PERSONNEL, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 28, 2006



DATE _____ **BRUCE M. GORMAN, ALJ**

E-mail Receipt of Initial Decision Confirmed by the Merit System Board on:

DATE

Mailed to Parties:

DATE
LAW

OFFICE OF ADMINISTRATIVE

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WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

None

For Respondent:

Dennis Gunn, Senior Investigator
Salvatore Leto, Senior Investigator
Dr. George F. Jackson
Harry Chance, Captain

EXHIBITS

For Appellant:

None

For Respondent:

R-1	Final Notice of Disciplinary Action, October 27, 2004
R-2	Preliminary Notice of Disciplinary Action, September 28, 2004
R-3	New Jersey Department of Corrections Master List, August 2, 2004 to August 31, 2004
R-4	Drug Screening Program Monitor Booklet, August 18, 2004

- R-5 New Jersey Department of Corrections Continuity of Evidence –
Urine Specimen Form, August 18, 2004
- R-7 New Jersey Department of Corrections Frozen Specimen
Receipt, August 18, 2004
- R-8 South Woods State Prison Special Report, September 29, 2004
- R-9 State of New Jersey, State Toxicology Lab Report, appellant's
Drug Screening Results
- R-12 Department of Corrections – Urine Specimen Bottle